IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPEAL NO.145 OF 2006

Satish Sadanand Amin
R/o. JN-1, B/5, Sector No.9,
Vashi, New Mumbai
(Presently in Thane Central Prison) ..Appellant
(Orig.Accd.No.2)

Vs.

The State of Maharashtra
(Through Police Station Shivaji Park,
Mumbai) ..Respondent.

Ms.Noorseema M. Baig, adv. for the Appellant.
Ms.M.H.Mhatre, APP for the Respondent/State.

CORAM : J.H.BHATIA, J.
DATE : JUNE 27, 2007.

ORAL JUDGMENT:

1. This appeal is preferred by the original accused no.2 Satish, who was convicted for the offences punishable under Section 341 read with Section 34 of the I.P.C. and was sentenced to undergo R.I. for one month. He was also convicted under Section 395 read with Section 397 of the I.P.C. and was sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/- and in default to undergo further S.I. for three months.

2. Prosecution case in brief, is that the complainant Rameshkumar Saremalji Jain, who is P.W.1, used to deal in old, torn and soiled currency notes.

He used to collect such currency notes from his customers and by accepting some commission from them, he used to deposit such currency notes with Reserve Bank of India in exchange of new notes. On 25-6-2003 at about 10.30 a.m., he deposited amount of Rs.1,60,000/- with Reserve Bank of India in the form of torn, old and soiled currency notes and in exchange, he got new currency notes. After that he returned home. At about 8.30 p.m., he left his house with an amount of Rs.1,45,000/-, kept in a cloth bag wrapped in plastic bag and tugged that bag with the hook of his scooter with intent to make the payment to his customers. Accordingly, he made payments of Rs.50,000/- to four of his customers. At about 9 to 10 p.m., he was proceeding towards Dadar T.T. When he was near Prabhodhankar Thakare Bus Stop, a Maruti Esteem Car bearing No.MH-01-DH-3158 came from his backside in speed. The car came just close to him and thus, he was forced to take his scooter to the extreme left. Due to this, he fell down from the scooter. At that time 3 persons came out from the Maruti Esteem Car. One of them was having chopper wrapped in the transparent plastic bag. One of them came near his scooter and started removing bag containing amount, which was tugged with the hook of the scooter. The said person tried to snatch the bag but it fell down. The complainant Rameshkumar immediately picked up that bag

and ran away across the road and he tried to enter into the S.T.D. booth. Two persons came running upto him. Sensing the trouble, the S.T.D. booth owner asked him to go out. At that time, out of the two persons, who had come running, one came behind him and assaulted him with a chopper on his left wrist and palm and another person snatched away the bag containing an amount of Rs.95,000/- from him. After that both of them ran away. The complainant Rameshkumar shouted for help. However, in view of the chopper in the hands of one of the culprits, people did not intervene. Those persons escaped away by the same Maruti Esteem Car. After that one Kamal Shikhare stopped a taxi and took him to K.E.M. Hospital for treatment. On the way to K.E.M. Hospital, the complainant Rameshkumar informed his family members and also the police headquarters about this incident. After he was taken to K.E.M. Hospital, P.S.I. Tukaram Jadhav reached there and recorded his report on the basis of which the offence was registered. Police went to the spot of the incident immediately and recovered the chopper lying on the spot of the incident. He also recorded statements of several persons.

3. On 26-6-2003, the said Maruti Esteem Car was found lying unclaimed at Matunga and was seized. After enquiry, it was found that the said car belonged to one

Sunil but it was stolen away by some persons and was used for the commission of this offence.

4. Accused No.1 Shivdas Gauda was arrested on 6-11-2003 and the present appellant Satish, who was accused no.2, was arrested on 12-11-2003. Two more accused came to be arrested. After investigation, charge-sheet came to be filed against the accused nos.1 to 4 and two absconding accused Rakesh and Manish, who were shown as accused nos.5 and 6.

5. Accused nos.1 to 4 were charged for the offences punishable under Sections 341, 395 read with Section 397 as well as under Section 135 of the Bombay Police Act. The accused pleaded not guilty.

6. On behalf of the prosecution, in all ten witnesses were examined and several documents were placed on record. After hearing both sides, the learned trial Court did not believe involvement of the accused nos.3 and 4 and acquitted them. Accused no.1 Shivdas was convicted under Section 395 and 341 of the I.P.C. while, the present appellant/accused no.2 was convicted under Section 395 read with Section 397 and under Section 341 of the I.P.C. and was sentenced as stated above.

7. Heard the learned counsel for the parties. Perused the record and proceeding of the trial Court.

8. In his evidence P.W.1 Rameshkumar deposed that he was in business of old, torn and soiled currency notes. His customers used to give him old, torn and soiled currency notes and he used to deposit the same with Reserve Bank of India where he would get new currency notes in exchange. From that he used to get some commission and after deducting his commission, he used to make payment to his customers. As per his evidence on 25-6-2003, he had deposited an amount of Rs.1,60,000/- with Reserve Bank of India and had received new currency notes. He had returned home at about 2.30 p.m. At about 8.30 p.m., he left his house with cash of Rs.1,45,000/- to make the payment to his customers. Out of this amount, he made payment of an amount of Rs.50,000/- to his four different customers and balance amount of Rs.95,000/- was in cloth bag which was kept in plastic bag. That bag was tugged with the hook of his scooter and he was proceeding to pay the amount to his different customers. According to him, after making payment to the Manager of the Classic Bar near Siddhivinayak Temple, he was proceeding towards Dadar T.T. by the byelane of the temple via Portuguese Church. Due to rain, he was wearing raincoat and the speed of the scooter was low.

When he was in front of Prabodhankar Thakare Bus Stop, the Maruti Esteem car, bearing no.MH-01 DH-3158, came from his behind and it pressed his scooter to the extreme left, due to which the scooter fell down. At that time three persons came out from the Maruti Esteem car. As per his evidence, one person tried to snatch his bag of money and also assaulted him with a knife on his left hand at two places. Due to this P.W.1 Ramesh left his scooter at the spot and tried to run away to the opposite side of the road alongwith his bag and for protection, he entered into one S.T.D. booth. At the same time, two of the culprits came behind him near the S.T.D. booth. Due to this, owner of the S.T.D. booth asked Rameshkumar to go out of his booth as he did not want any trouble there. One of the culprits assaulted him with a chopper on his left palm and another person snatched his bag and ran away. After that Kamal Shikhare stopped one taxi and took him to K.E.M. Hospital. Evidence of the complainant Rameshkumar is corroborated by the testimony of P.W.3 Kamal Shikhare, P.W.4 Ramesh Singh, P.W.5 Sunil Sharma and P.W.7 Shailesh Chingla. P.W.3 Kamal Shikhare and P.W.4 Ramesh Singh do not claim to have identified the culprits though they were eye witnesses of the incident. Taking into consideration evidence of these witnesses, there remains no doubt that the offence of robbery was committed and an amount of Rs.95,000/- kept

in the bag was snatched and taken away from Rameshkumar.

9. Now the question is what offences if any, were committed and whether the accused no.2 Satish was one of the culprits. Evidence of P.W.8 Rajendra Kale, who was S.E.M., revealed that the Test Identification Parades were conducted on 1-12-2003 and on 18-12-2003. About the identification parade held on 1-12-2003, detail memorandum cum panchanama Ex. 30 was prepared. That identification parade was held at the Central Jail, Thane. In that identification parade, 3 suspects namely accused no.2 Satish, accused no.3 Mudaliyar and accused no.4 Pujari were required to be identified by the witnesses. Second identification parade was held at Arthur Road Jail on 18-12-2003 and during that test identification parade, accused no.1 Shivdas was required to be identified by the witnesses. About that proceeding, memorandum cum panchanama Ex.31 was recorded. It may be noted that the accused no.1 Shivdas, who was convicted and who had also preferred a separate appeal, was reported to have died pending the appeal and, therefore, that appeal was disposed off as abated. To decide whether the present appellant was the culprit or not, second identification parade is not relevant.

10. P.W.1 Rameshkumar, P.W.6 Kavita and P.W.7 Shailesh had identified the present appellant during the test identification parade. Therefore, it will be necessary to scrutinise the evidence of these 3 witnesses in the light of memorandum Ex.30 about the test identification parade. In his evidence P.W.1 Rameshkumar deposed that he had identified during the first identification parade three persons being the accused nos.2, 3 and 4. During the second identification parade, he had also identified the accused no.1 Shivdas. Thus, he identified four persons as the culprits but in his evidence he had specifically deposed that only three persons came out of the car. Initially one of them tried to snatch his bag of money and also assaulted with knife. After he ran away across the road near S.T.D. booth, one of them had assaulted him with a chopper and another person had snatched away his bag and had run away. In his evidence, nowhere he had shown presence of more than 3 persons. Evidence of P.W.6 Kavita shows that one person, i.e., P.W.1 Rameshkumar came running in front of her shop and two persons were behind him with choppers and they assaulted him with choppers. She identified accused no.2 Satish during the first identification parade and she identified Shivdas during the second identification parade. P.W.7 Shailesh deposed that he was sitting in S.T.D. booth. At that

time one person, i.e., the complainant came in his S.T.D. booth with a bag in his hand and two persons came behind him. Those two persons were possessing choppers. Both of them assaulted and snatched his bag and ran away. He identified accused no.2 Satish as one of them. He had also identified him during the test identification parade. In view of the evidence of these three persons, who have identified accused no.2 before the Court as well as during the test identification parade it can be believed that the present appellant was one of the culprits and he was involved in the commission of offence.

11. However, it should be noted that as per the evidence of P.W.1 Ramesh, three persons were involved in the commission of the crime while P.W.6 Kavita and P.W.7 Shailesh had seen two persons. Possibly they saw only two persons because they had seen the incident, which had taken place outside the S.T.D. booth and they had not seen what had happened before the complainant came to S.T.D. booth. In view of this evidence, it may be believed that in all 3 persons were involved in the commission of the crime and out of them two persons came to the booth and finally they snatched away the bag containing cash. For the commission of dacoity as defined in Section 391 of the I.P.C., it is necessary that five or more persons conjointly commit

or attempt to commit robbery. Therefore, it is necessary that the number of persons involved in the commission of dacoity should not be less than five. In the present case, from the evidence it appears that three persons were involved in the said offence. Atleast there is no evidence on record to show that five or more persons were involved in the commission of the crime. Therefore, it must be held that the prosecution could not establish that the offence of dacoity punishable under Section 395 was committed. The learned Trial Court did not believe the evidence of Rameshkumar about the identification of accused nos.3 and 4 and acquitted them. However, the learned trial Court also did not give any reasons as to why only two persons, i.e., accused nos.1 and 2 were being convicted for the offence of dacoity. In my opinion, the learned trial Court committed serious error in convicting the appellant for the offences punishable under Section 395 of the I.P.C. In view of the evidence, he could be convicted for the offence of robbery.

12. The learned trial Court invoked Section 397 of the I.P.C. in respect of the present appellant. Section 397 does not create substantive offence. It only regulates the punishment in the case of robbery or dacoity and in either case, offender, who used deadly weapons at the time of committing robbery or dacoity is

liable to be punished with sentence of imprisonment, which shall not be less than 7 years. Therefore, Section 397 can be applicable and the minimum sentence of 7 years could be imposed even in the case of robbery if prosecution succeeds to prove that particular accused had used deadly weapon while committing the offence.

13. To find out whether Section 397 is applicable to the present appellant or not, evidence of the above referred three eye witnesses will have to be closely scrutinised in the light of the contents of the memorandum of test identification parade. Evidence of Rameshkumar shows that one of the culprits was armed with chopper, and in his evidence before the Court, he deposed that the accused no.2 Satish was the person, who was armed with chopper and he had assaulted him with a chopper. Other two witnesses P.W.6 Kavita and P.W.7 Shailesh, however, deposed that both the culprits were armed with choppers and both of them had assaulted Rameshkumar with the choppers. In this respect, their evidence is inconsistent with the evidence of Rameshkumar. The memorandum Ex.30 pertaining to the test identification parade shows that while identifying the accused persons, these three witnesses had specifically attributed the roles played by them. Each of these witnesses stated at the time of test

identification parade that out of two persons, one was armed with chopper and he assaulted Ramesh and another person snatched away the bag from his hands. Each of these witnesses pointed to the accused no.2 Satish as the person, who had snatched away the bag. It shows that the accused no.2 Satish was not armed with chopper. This aspect was not taken into consideration by the trial Court.

14. It is the well settled position of law that Section 397 can be applied only to the offender, who uses deadly weapon. If in a group of offenders, one is armed with deadly weapon, he alone can be punished with the help of Section 397. While remaining accused/offenders may be punished for the offence of robbery or dacoity according to the nature of the offence but without help of Section 397. In view of this, the present appellant can not be convicted and sentenced for the offence of robbery with the help of Section 397. Evidence of all the above witnesses shows that P.W.1 Ramesh was assaulted with a knife and chopper and he had sustained injuries and he was also taken to the hospital. However, the medical officer, who had examined P.W.1 Rameshkumar, was not examined before the Court. Record revealed that during the evidence of P.W.10 Police Inspector Rajeshwari Redkar, who was Investigating Officer, medical certificate of

Ramesh was admitted in evidence and was given Ex.42, subject to objection of the defence counsel. When the medical officer was not examined and he had not proved injuries, medical certificate could not be admitted and exhibited in the evidence, unless, ofcourse, the document was admitted on behalf of the accused in response to the notice under Section 294 of the Cr.P.C. There is nothing on record that such a notice under Section 294 was given and accused had admitted medical certificate. On the contrary, the evidence of P.W.10 P.I. Rajeshree Redkar clearly shows that medical certificate was exhibited subject to objection taken on behalf of the accused. Therefore, it must be held that prosecution had failed to prove injuries. In view of this the accused could not be convicted under Section 394 of the I.P.C. even though according to the prosecution, Rameshkumar was assaulted and had suffered certain injuries.

15. Taking into consideration the evidence on record, the accused/appellant could not be convicted under Section 395 because the prosecution evidence does not show that five or more persons were involved in the commission of offence. At the most three persons were involved. Therefore, the offence of robbery was committed and the accused could be held guilty under Section 392 of the I.P.C. As the prosecution has

failed to prove that the present appellant was armed with a chopper, which is a deadly weapon, and had used it at the time of commission of the crime, Section 397 of the I.P.C. can not be applied to him. As such he will have to be convicted and sentenced under Section 392 read with Section 34 of the I.P.C. After going through the evidence I also donot find any material to convict the accused/appellant for the offence punishable under Section 341, i.e., for wrongful restraint of Rameshkumar.

16. The learned trial Court had passed the sentence of R.I. for seven years with fine while convicting the appellant for the offence punishable under Section 395 read with Section 397 of the I.P.C. I find that offence of dacoity is not proved but the prosecution has proved that the accused had committed the offence of robbery punishable under Section 392 only and, therefore, in my opinion, he may be awarded sentence less than what the trial Court has awarded. The accused is in custody since the date of his arrest on 12-11-2003. Taking into consideration the nature of the offence, in my opinion, R.I. for five years will meet the ends of justice.

17. In the result, appeal is partly allowed. Impugned order of conviction of the accused for the

offences punishable under Section 395 read with Section 397 and under Section 341 and the sentences for the same, is hereby set aside. The accused/appellant no.2 is, instead, convicted for the offence punishable under Section 392 of the I.P.C. and is sentenced to undergo R.I. for five years and to pay fine of Rs.500/- and in default to pay fine, to undergo further R.I. for two months.

[J.H.BHATIA, J.]